IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.1098 OF 2005

ALONG WITH

CIVIL APPLICATION NO.1755 OF 2005

Sou.Rohini Chandrakant Chitnis

& Anr. ...Appellants

Versus

Pandurang Shivram Sapat

Since deceased through his Legal Heirs

1.a Yashwant Pandurang Sapat

& Ors. ...Respondents

.....

Mr.R.S.Apte with Mr.Vaibhav P.Patankar for Appellants.

Mr.K.S.Dewal i/b Mr.Patil for Respondents 1.a to 1.e.

.....

CORAM: A.M.KHANWILKAR, J.

JANUARY 23, 2006.

P.C.

1. This matter was adjourned to enable the parties to explore possibility of settlement. It is, however, reported that settlement talks have failed. In the circumstances, hearing of the

matter was proceeded on merits, by consent.

2. After hearing Counsel for the parties, as substantial question of law was raised by the Appellants, the Second Appeal will have to be admitted. Hence, admit. Mr.Dewal waives notice for Respondents 1.a to 1.e. Respondents 2 to 4 are formal parties.

3. As short question is involved, by consent of the parties, the Appeal is heard forthwith for final hearing.

4. Insofar as findings on issues other than issue No.6 framed by the Trial Court are concerned, I am in agreement with the concurrent view taken by the two Courts below. As those are the findings of facts concurrently reached by the two Courts below, it is not open for this Court to undertake scrutiny of the evidence on record to arrive at a different conclusion, even though another view may be possible, in exercise of jurisdiction of Second Appeal. To that extent, the Appeal shall fail.

5. The only question that needs to be addressed in the present Appeal is: whether it is open to the Court to answer the relief of specific performance/contract in favour of the Plaintiff without adverting to the pleadings and evidence of the parties with regard to the factum of whether the Plaintiff was ready and willing to perform his part of contract?

6. In the present case, the Trial Court has answered the issue No.6 in the following terms:

> "20. ISSUE NO.6 : Admittedly, upto 1/1/81, the plaintiff has paid different amounts in instalment to the deceased Vaijnath Trimbak Gupte as per receipt at Exh.74 and 75. Further, after the death of Vaijnath Trimbak Gupte he had paid the amount of Rs.2640/- with the interest at the rate of 8.5% p.a. to the defendant no.1 as per the receipt at exh.76. It is quiet obvious, even after the death of Vaijnath Gupte the plaintiff has paid the some amounts to the defendant no.1, who is the son of the deceased Vaijnath Trimbak Gupte. These amount paid by the plaintiff to the deceased Vaijnath Gupte as well as to the defendant no.1 are in connection with the agreement to sell the suit property. Therefore, it is obvious that the plaintiff was and is ready and willing to perform the part of his contract. But the defendant no.1 after the receipt of amount out of the balance amount. hence

my finding to issue no.6 is in the affirmative."

7. The Appellate Court has considered the same question in Paragraphs 18 and 19 in the following terms:

"18. It is also significant to mention here that though it was averred in the written statement by the defendants that suit properties are in their possession, the documents produced on record clearly indicate the possession of the plaintiff. Moreover D.W.1 Vivek Gupte, son of the deceased Vaijnath in clear terms admitted that since the year 1973 suit property is in physical possession of plaintiff till today. This fact also supports to the case of the plaintiff in respect of the execution of the agreement of sale by deceased Vaijnath. It may be noted here that if it had been the fact that earlier agreement of the year 1978 is cancelled by Vaijnath and he has no intention to sale the property to plaintiff then he would have taken the steps to take the possession of the suit properties. But the circumstances and the documents clearly show that Vaijnath or his legal heirs have not taken any steps to take the possession of the suit property and since the year 1973 the suit properties are in possession of the plaintiff. Thus, considering all the circumstances, the story put up by the defendants that after cancellation of the agreement of the year 1978 deceased Vaijnath has not executed any agreement of sale in favour of the plaintiff cannot be relied and cannot be accepted. On the other hand it is evident

> from the evidence on record that there was the agreement of the sale between the parties and both the parties acted on the said terms of the agreement and the subsequent payments were also received by the deceased Vaijnath and his son.
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> 19. Thus, the plaintiff has proved the suit transaction, and the agreement of sale executed by deceased Vaijnath on 10.10.79 and he was ready to perform his part of the contract while the defendants avoided to execute the sale deed. This fact is also apparent from the conduct of the defendants that they are disputing the signature of Vaijnath Gupte on the agreement of sale dated 10.10.79 and the execution agreement of sale by him."

8. Suffice it to observe that neither the Trial Court nor the Appellate Court has considered the issue in the manner, it ought to have been dealt with to arrive at a positive finding that the Plaintiff was throughout ready and willing to perform his part of contract. Neither the pleadings nor the evidence of the rival parties have been analysed while considering the subject issue. Counsel for the Respondent/Plaintiff would, however, contend that there is evidence on record to support the conclusion reached by the two Courts below on the said issue. Indeed, it is open to this Court to reconsider the matter if the Court below has not dealt with the relevant materials on

record on the crucial fact to determine the claim of the parties. However, instead, I would prefer to relegate the parties to the Appellate Court who in turn, will have to decide the factum of whether Plaintiff was ready and willing to perform his part of contract, afresh in accordance with law.

9. Counsel for the Respondent placed reliance on the decision of the Apex Court in the case of **Veerayee Ammal vs. Seeni Ammal reported in (2002) 1 SCC 134**, to contend that whether in the circumstances of the case, the Plaintiff has established that he was ready and willing to perform his part of the contract, cannot be said to be substantial question of law. The exposition of the Apex Court will have to be considered in context of the fact situation of that case, whereas, in the present case, I have already taken the view that even on fair reading of the findings recorded by the Trial Court and the Appellate Court on the subject issue, it is not possible to suggest that the same is in conformity with the requirement to address the issue. The Courts below have not at all adverted to the relevant pleadings and evidence

on record while answering the said issue, which has resulted in manifest error in reaching at the conclusion recorded on the said issue. Hence, this appeal ought to succeed on the above terms. The impugned Judgment and order is set-aside and the

parties are relegated to the Appellate Court for the limited purpose of reconsidering the issue No.6 framed by the Trial Court on its own merits in accordance with law. All questions in that behalf are kept open.

10. The Appellate Court shall decide the Appeal as expeditiously as possible, preferably within six months from the receipt of writ of this Court. Parties are directed to appear before the Appellate Court on 15th February 2006 to enable the Appellate Court to issue appropriate directions as may be advised.

11. In view of the above order, Civil Application also stand disposed of.

A.M.KHANWILKAR, J.